

E-Filed 8/9/10

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

LI DONG MA,

Plaintiff,

v.

RSM MCGLADREY, INC., et al.,

Defendants

Case Number C 08-1729 JF (PVT)

**ORDER¹ GRANTING
DEFENDANTS' MOTION TO
DISMISS CLASS CLAIMS WITH
PREJUDICE**

Defendants move pursuant to Fed. R. Civ. Pro. 41(b) to dismiss Plaintiff's class claims with prejudice based upon Plaintiff's failure to comply with court orders. The Court has considered the moving and responding papers and the oral argument of counsel presented at the hearing on August 6, 2010. For the reasons discussed below, the motion will be granted.

I. BACKGROUND

On February 21, 2008, Plaintiff Li Dong Ma filed the instant putative class action in the Santa Clara Superior Court, alleging that Defendants violated California law by failing to pay overtime wages and to provide rest and meal breaks to their employees. On March 31, 2008, Defendants removed the action to this Court. On May 8, 2009, at Plaintiff's request, the Court

¹ This disposition is not designated for publication in the official reports.

1 set a case management schedule that included a deadline of February 9, 2010, for filing of
2 Plaintiff's motion for class certification. A hearing on the class certification motion was set for
3 May 17, 2010. However, Plaintiff has yet to file a motion to certify the class. On March 25,
4 2010, Defendants filed the instant motion to dismiss the class claims.

5 On April 16, 2010, three weeks after Defendants filed the instant motion and more than
6 two months after the February 9 filing deadline, Plaintiff moved for administrative relief,
7 requesting that the Court establish a new case management schedule. Plaintiff's counsel claimed
8 that their failure to file the class certification motion in accordance with the schedule they
9 themselves had proposed was the result of a good faith mistake that occurred when one of
10 Plaintiff's attorneys changed firms, and that they had believed (incorrectly) that the filing
11 deadline was April 9, 2010, rather than February 9, 2010. Counsel also expressly and repeatedly
12 placed much of the blame for their delay on Defendants' alleged refusal to produce discovery
13 necessary to the class certification motion. *See, e.g.*, Pl.'s Admin. Mot. to Cont. 2 ("[A]
14 continuance of the class certification schedule is appropriate (and would have been needed in
15 February as well) because Defendant has failed to produce all discovery necessary for the Court
16 to make a certification decision based on a complete record."); *id.* at 3 ("Plaintiff believed that
17 Defendant would in good faith meet and confer on any discovery issues and therefore, issues
18 could be resolved without the need for motions to compel. However, Defendant took advantage
19 of Plaintiff's belief and endeavored to run out the clock on the certification filing schedule."); *id.*
20 at 4 ("In light of Defendant's dilatory tactics in response to Plaintiff's efforts to meet and confer
21 on outstanding discovery issues, Plaintiff had no choice but to file two motions compel on March
22 30[, 2010]."); *id.* at 4 ("Defendant can hardly claim prejudice when the current status of the
23 discovery is a direct result of Defendant's strategic decisions.").

24 In opposing the administrative motion, Defendants noted that Plaintiff has three attorneys
25 of record. Defendants also pointed out that Plaintiff sought *no* discovery for more than a year
26 after serving an initial round of interrogatories and requests for production on January 9, 2009,
27 and that Plaintiff's recent deposition notices, which were not served until March 12, 2010,
28 purported to set depositions for April 9, 2010, the date counsel claim they mistook for the class

1 certification motion filing deadline.

2 In an order dated April 27, 2010, the Court denied Plaintiff's motion for relief from the
3 case management schedule. However, the Court acknowledged that two motions to compel were
4 then pending before Magistrate Judge Trumbull and concluded that "[b]ecause it is conceivable
5 that Judge Trumbull could find that Defendants' actions with respect to discovery may have
6 affected Plaintiff's ability to move for class certification in a timely manner, the Court will deny
7 the instant motion without prejudice." Dkt. No. 79 at 2. In an order dated July 19, 2010,
8 addressing the motions to compel, Judge Trumbull concluded that:

9 Nothing the parties submitted to the court in connection with Plaintiff's motions
10 to compel suggests that Defendants did anything that affected Plaintiff's ability to
11 move for class certification in a timely manner. Plaintiff served the discovery on
12 January 9, 2009. Defendant served its responses and objections on February 27,
13 2009. Plaintiff waited almost a year before attempting to meet and confer with
14 Defendant regarding its objections to the discovery. Nothing in the record
15 indicates that Plaintiff's delay in moving to compel was in any way Defendant's
16 fault.

17 Dkt. No. 83 at 2 n.1.

18 II. DISCUSSION

19 In determining whether to dismiss a claim or action under Rule 41(b), the Court must
20 balance five factors: (1) the public's interest in expeditious resolution of litigation; (2) the
21 court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public
22 policy favoring disposition of cases on their merits; and (5) the availability of less drastic
23 alternatives. *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999). As a preliminary
24 matter, the Court notes that Plaintiff's opposition to the instant motion reasserts a main theme of
25 her administrative motion: that counsel's failure to comply with the case management schedule
26 was caused in large part by Defendants' discovery conduct. *See, e.g.*, Pl.'s Opp'n 7 ("If anything,
27 Defendant's strategy to manufacture a basis for which to escape its duties under the Labor Code
28 are [sic] unnecessarily clogging this Court's docket with motions and hearings that would not
have been needed were Defendant to have engaged in the meet and confer process in good
faith."); *id.* at 8 ("It is Defendant's conduct that has caused any delay here. . . . Defendant should
not be rewarded for its litigation stratagems designed to fabricate a delay where none would have

1 existed but for Defendant's failure to provide discovery and failure to reasonably
2 communicate."); *id.* at 13 ("Plaintiff's counsel's [calendaring] mistake was exacerbated by
3 Defendant's refusal to provide discovery or communicate. Prior to the perceived deadline,
4 [Plaintiff's counsel] took steps to address these issues and the filing date only to be met by
5 obfuscation and further delay by Defendant."). However, as Judge Trumbull found, there is no
6 evidence in the record that Defendants in any way prevented Plaintiff from proceeding with
7 discovery relevant to the class certification motion, or from moving to compel additional
8 discovery, between February 27, **2009**, the date on which Defendant responded to Plaintiff's
9 interrogatories and requests for documents, and March 30, **2010**, the date Plaintiff ultimately
10 filed her motions to compel.

11 At oral argument, Plaintiff's counsel suggested that holding them to the arguments made
12 in their administrative motion would amount to "no good deed going unpunished," implying that
13 Plaintiff's opposition to the instant motion was based upon counsel's excusable neglect and the
14 lack of any prejudice to Defendants rather than Defendants' purported frustration of Plaintiff's
15 discovery efforts. While it is troubled by the unfounded representations in the earlier
16 administrative motion, the Court is even more concerned by counsel's mischaracterization of
17 their own papers in opposition to the instant motion, which continue to blame Defendants for the
18 delay. Even though it might not have affected the outcome, an honest and unqualified
19 acceptance of responsibility would have reflected more favorably on counsel and would have
20 been welcome.

21 **A. The Public's Interest in Expeditious Resolution of Litigation**

22 With respect to the first factor, "[t]he public's interest in expeditious resolution of
23 litigation always favors dismissal." *Yourish*, 191 F.3d at 990. In addition to blaming Defendants
24 for the delay, Plaintiff argues that "the public's interest in expeditious resolution is not thwarted
25 here because complex litigation, such as the case at bar, is more time intensive than non-complex
26 litigation." Pl.'s Opp'n 8. While complex litigation by definition tends to require more effort,
27 Plaintiff's counsel do not explain how their failure to comply with deadlines they themselves
28 requested resulted from the complexity of the instant case. Because movement toward resolution

1 of the litigation has been delayed by counsel's unjustified failure to comply with the case
2 management schedule, this factor favors dismissal.

3 **B. The Court's Need to Manage Its Docket**

4 With respect to the second factor, "[t]he trial judge is in the best position to determine
5 whether the delay in a particular case interferes with docket management and the public interest."
6 *Yourish*, 191 F.3d at 990. In *Yourish*, the Ninth Circuit found that this factor "strongly favor[ed]
7 dismissal" where the district court had found that the plaintiffs "knew that they were required to
8 file the amended complaint within sixty days rather than within sixty [days] of the issuance of a
9 written order as they claim." *Id.* at 991. Here, Plaintiff argues that the second *Yourish* factor
10 does not favor dismissal because she "reasonably did not know the deadline had expired and []
11 acted quickly upon determining that the specially set deadline had passed." Pl.'s Opp'n 7.
12 Plaintiff also contends that this factor cannot weigh in favor of dismissal because another wage
13 and hour case on the Court's docket, *Ho v. Ernst & Young LLP*, C 05-4867 JF, "has been
14 pending in the precertification stage before this Court for 5 years" and because Defendants have
15 not presented evidence that Plaintiff's failure to comply with the case management schedule
16 negatively impacted the Court's docket. *Id.*

17 None of these arguments is well-taken. As to the first point, it was Plaintiff's counsel
18 who proposed the February 9 filing date. *See* Dkt No. 47 at 3:7-15. Plaintiff is represented by
19 three attorneys from three separate firms. Even if counsel reasonably erred in believing that the
20 filing deadline was April 9 rather than February 9, Plaintiff offers no explanation—other than
21 unsubstantiated claims against Defendants—as to why she did not file motions to compel until
22 March 30, 2010, (after Defendants filed the instant motion to dismiss) or why no deposition
23 notices served were served until March 12, 2010.

24 As to her second assertion, Plaintiff misconstrues the focus of the second *Yourish* factor.
25 The question is not merely how long a case remains on a court's docket or whether the defendant
26 can show that the court's docket was negatively impacted; the question is how the court's *interest*
27 *in managing its own docket* is affected. The district court in *Yourish* found that the plaintiff
28 "caused 'the action to come to a complete halt' and [] allowed the 'Plaintiff[] to control the pace

1 of the docket rather than the Court.” *Yourish*, 191 F.3d at 990 (quoting the district court’s order).
 2 Similarly here, by failing to move the case forward in accordance with the schedule they
 3 themselves proposed and waiting to seek relief from that schedule until two months after the
 4 filing deadline had passed, Plaintiff’s counsel effectively sought to control the pace of the
 5 Court’s docket.

6 Finally, as Defendants point out, “[e]ven a cursory review of the docket in *Ho* reflects
 7 that counsel in that case has been actively litigating the case throughout its pendency.” Defs.’
 8 Reply 3. While the case indeed has been pending for five years, there has been intensive
 9 discovery and motion practice, and virtually none of that period is attributable to inaction or
 10 neglect on the part of counsel.

11 For all of these reasons, this factor favors dismissal.

12 **C. The Risk of Prejudice to the Defendants**

13 With respect to the third *Yourish* factor, the Ninth Circuit has held that:

14 Failure to prosecute diligently is sufficient by itself to justify a dismissal, even in
 15 the absence of a showing of actual prejudice to the defendant from the failure. . . .
 16 The law presumes injury from unreasonable delay. However, this presumption of
 prejudice is a rebuttable one and if there is a showing that no actual prejudice
 occurred, that factor should be considered

17 *In re Eisen*, 31 F.3d 1447, 1452-53 (9th Cir. 1994) (citing *Anderson v. Air West, Inc.*, 542 F.2d
 18 522, 524 (9th Cir. 1976)). As to the burden of proving prejudice, the rule in the Ninth Circuit is
 19 that “[w]here a plaintiff has come forth with an excuse for his delay that is anything but
 20 frivolous, the burden of production shifts to the defendant to show at least some actual
 21 prejudice.” *Id.* (quoting *Nealey v. Transp. Maritima Mexicana, S.A.*, 662 F.2d 1275, 1281 (9th
 22 Cir. 1980)).

23 Plaintiff contends that Defendants cannot show evidence of actual prejudice caused by the
 24 delay. However, having considered carefully both Plaintiff’s administrative motion for relief
 25 from the case management schedule and Plaintiff’s arguments in opposition to the instant
 26 motion, the Court finds and concludes that Plaintiff’s failure to comply with the case
 27 management schedule was not the result of excusable neglect or another cognizable reason.
 28 Judge Trumbull concluded independently that counsel’s failure to file the class certification

1 motion in a timely manner was not attributable to any discovery misconduct by Defendants.
2 Accordingly, Plaintiff has failed to meet her initial burden of providing a non-frivolous excuse
3 for her delay, and prejudice to Defendants is presumed.

4 **D. The Public Policy Favoring Disposition of Cases on Their Merits**

5 With respect to the fourth *Yourish* factor, public policy favors disposition of cases on
6 their merits, implying that this factor weighs against dismissal. Defendants concede this general
7 proposition. However, they note that other courts have denied motions for class certification
8 where the plaintiff failed either to meet a case-specific filing deadline or comply with a local
9 rule. They argue that in such cases the general policy favoring disposition on the merits is
10 outweighed by other “public policies that favor the resolution of a class action with reasonable
11 diligence and compliance with court orders.” *See* Defs.’ Mot. 9-10; Defs.’ Reply 8.

12 While Defendants’ point is well-taken, this factor still weighs against dismissal.
13 However, it is not dispositive. *See, e.g., Yourish*, 191 F.3d at 992 (affirming the district court’s
14 dismissal despite the fact that the fourth factor weighed against dismissal). Moreover, as
15 Defendants request dismissal of the class action claims only, Plaintiff’s individual claims still
16 may proceed, presumably to a disposition on their merits.

17 **E. The Availability of Less Drastic Alternatives**

18 Finally, with respect to the final factor, Defendants point out that while dismissal of the
19 entire action would be justified, they seek only the less drastic alternative of dismissal of the
20 class claims. They assert that dismissal of the class claims would not prejudice either Plaintiff,
21 whose individual claims would proceed, or the putative class members, whose claims have been
22 tolled by operation of law and who would “remain free to filed a claim before the California
23 Labor Commissioner or file a complaint in the appropriate court if they believe that their rights
24 have been violated.” Defs.’ Mot. 12. Defendants rely upon *Hunter v. Digital Equipment Corp.*,
25 136 Fed. Appx. 28 (9th Cir. 2005), in which the district court dismissed a putative class action
26 suit in its entirety where the named plaintiff had “fail[ed] to be actively involved in the litigation
27 for at least 18 months.” *Hunter*, 136 Fed. Appx. at 29. The Ninth Circuit reversed the district
28 court’s dismissal of the named plaintiff’s individual claims but affirmed its dismissal of the class

1 claims, holding that:

2 Although we agree with the district court that there is some risk of prejudice to the
3 defendants in defending against both Claim 1 and Claim 2 for a potential class of
4 plaintiffs, the risk of prejudice appears to be minimal to nonexistent in defending
5 an action brought by Hunter as an individual plaintiff as to Claim 1. Accordingly,
6 we hold that although Claim 2 was properly dismissed, Hunter should have been
allowed to proceed with Claim 1, on an individual basis, *as a less drastic
alternative to complete dismissal*. Such a sanction adequately vindicates the
court's legitimate concerns with the effects of Hunter's strategic delay while at the
same time honoring the strong policy of resolving cases on their merits.

7 *Id.* (emphasis added).

8 III. DISPOSITION

9 Plaintiff claims that involuntary dismissal of the class claims with prejudice would be “a
10 drastic and extreme measure” and would be “the ‘death knell’ of the case” because “[t]he reality
11 is that if the class action allegations are dismissed, these class members will have their right to be
12 paid their wages under the law dismissed without determination on the merits.” Pl.’s Opp’n 13.
13 She also contends that dismissal is not warranted by “delay resulting from simple negligence,”
14 particularly when “counsel’s mistake was exacerbated by Defendant’s refusal to provide
15 discovery or communicate.” *Id.* Plaintiff maintains that *Hunter* is inapposite because the district
16 court in that case found that four of the five *Yourish* factors favored dismissal while none of the
17 factors favors dismissal here.

18 Defendants observe correctly that the “death knell” doctrine does not affect the propriety
19 of dismissal of the instant class claims but relates instead to whether an individual plaintiff may
20 appeal an adverse class certification ruling. In *Coopers & Lybrand v. Livesay*, 437 U.S. 463
21 (1978), the Supreme Court held that “the fact that an interlocutory order [such as the order
22 denying class certification in *Livesay*] may induce a party to abandon his claim before final
23 judgment is not a sufficient reason for considering it a ‘final decision’ within the meaning of [28
24 U.S.C.] § 1291.” 437 U.S. at 477. While there may be alternatives less drastic than dismissal of
25 the instant class action claims with prejudice—for example, monetary or issue sanctions—the Court
26 concludes that the result reached by the Ninth Circuit in *Hunter* is equally appropriate here.
27 Counsel assert that “regardless of whether the deadline to file the motion was February 9 or April
28 9, Plaintiff reasonably needs an extension of time to prepare for and file her motion due to

1 Defendant's failure to meet its discovery obligations." Pl.'s Opp'n 8. As both the Court and
 2 Judge Trumbull have found, counsel's failure to comply with the schedule they themselves
 3 proposed or to seek timely relief from that schedule had nothing to do with Defendants'
 4 discovery conduct, and, like the plaintiff's failure to prosecute in *Hunter*, it is not otherwise
 5 excusable.

6 Accordingly, the Court finds and concludes that dismissal of the class action claims with
 7 prejudice is warranted.² As both parties acknowledge, the putative class members will suffer
 8 very little actual prejudice from this result, as their claims have been tolled and they remain free
 9 to seek remedies for Defendants' alleged wrongful conduct toward them.³

10 **IT IS SO ORDERED**

11 DATED: 8/9/10

12 
 13 JEREMY FOGEL
 14 United States District Judge

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 23 ² Plaintiff contends that "warnings to plaintiff (or lack thereof)" is a sixth *Yourish* factor.
 24 Pl.'s Opp'n 5, 11. See *Yourish*, 191 F.3d at 990 (listing the factors to be considered). However,
 25 the Ninth Circuit "expressly rejected the argument that an express warning regarding the
 26 possibility of dismissal is a prerequisite to a Rule 41(b) dismissal when dismissal follows a
 noticed motion under Rule 41(b)." *In re Eisen*, 31 F.3d at 1455 (citing *Morris v. Morgan Stanley*
 & Co., 942 F.2d 648, 652 (9th Cir. 1991)).

27 ³ At oral argument, the parties disagreed as to whether following dismissal of the class
 28 claims, the instant action may continue as a representative action under Cal. Bus. & Prof. §
 17200. As that issue has not been briefed, the Court expresses no position with respect to it.